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Supreme Court, U.S.
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No. 95-1473

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PRAXAIR, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY and
FLORIDA POWER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR RESPONDENT FLORIDA POWER CORPORATION IN OPPOSITION

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April 12, 1996

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QUESTION PRESENTED

Whether an order of the Florida Public Service Commission dividing the retail service territories of two regulated electric utilities assigned Brevard County, Florida, to respondent Florida Power & Light Company.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

Florida Progress Corporation -- Parent Company to respondent Florida Power Corporation

Florida Power Corporation -- respondent

Florida Power Corporation has no subsidiaries that are not wholly owned.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 64 F.3d 609. The district court's opinion and order denying the parties' cross-motions for summary judgment (Pet. App. 10a-28a), and its opinion and order denying the parties' cross-motions for reconsideration (Pet. App. 31a-33a), are unreported.

JURISDICTION

The court of appeals entered its judgment on September 19, 1995. The court of appeals denied a suggestion of rehearing en banc on December 15, 1995. Pet. App. 29a-30a. Pursuant to Eleventh Circuit Rule 35-6, a suggestion of rehearing en banc is also treated as a petition for rehearing before the original panel. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

To avoid unnecessarily burdening the Court with repetitive submissions, respondent Florida Power Corporation adopts the statement contained in the brief in opposition submitted by co-respondent Florida Power & Light.

REASONS FOR DENYING THE WRIT

Respondent Florida Power Corporation fully concurs with the reasons for denying the writ contained in the brief in opposition submitted by co-respondent Florida Power & Light and hereby adopts those arguments. Respondent Florida Power Corporation wishes to make one additional point not raised in the response of its co-respondent.

As explained by co-respondent Florida Power & Light, the Eleventh Circuit appropriately concluded that the correct reading of the Florida Public Service Commission's 1965 order is that the order allocates Brevard County to Florida Power & Light. As co-respondent also further points out, the Eleventh Circuit buttressed this conclusion with an alternative holding grounded in the Florida Public Service Commission's subsequent interpretation and implementation of its 1965 order. It is this latter analysis to which petitioner points in asserting a supposed conflict with the Ninth Circuit's holding in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 60 F.3d 1390 (9th Cir. 1995).

Florida Power Corporation would note that, in taking account of subsequent Commission pronouncements and activity, the alternative portion of the Eleventh Circuit's analysis -- far from creating a split -- actually is in direct accord with the Ninth Circuit's review in *Columbia Steel*. Thus, in *Columbia Steel*, the Ninth Circuit concluded that a 1974 order of the Oregon utility commission provided an "authoritative clarification" of the original intent to establish exclusive territories through its initial 1972 order. The Ninth Circuit further buttressed this conclusion through reference to "consistent" utility commission orders from throughout the 1973-79 period. *Id.* at 1398.

This is fully consistent with the Eleventh Circuit's approach and with this Court's controlling authority. As set out more fully in co-respondent's brief, the Eleventh Circuit initially concluded that the "entirely plausible and reasonable explanation" of the initial 1965 Florida Public Service Commission order was

that the order allocated Brevard County to Florida Power & Light. The fact that the Eleventh Circuit then also looked at "30 years" of subsequent Commission practice, including the Commission's six year "comprehensive review of approved territorial agreements," merely serves to demonstrate the common approach shared by the two circuits, whereby each court recognized that an agency's interpretation of its own order is entitled to substantial deference. Indeed, the Eleventh Circuit's concluding comments that, in light of the Commission's own historic practice and interpretation, "the Commission reasonably interpreted the prior agreement to allocate [Brevard to Florida Power & Light]," illustrates that the Eleventh Circuit was using evidence of the Commission's practice and interpretation in the precise manner endorsed in *Columbia Steel*, i.e. as an interpretive aid that served simply to further confirm the court's initial interpretation of the 1965 order.

Not only is there no conflict with *Columbia Steel*, such an approach is entirely proper. It effectively implements the well-recognized principle that the courts must respect an agency's reasonable interpretation of its order, especially when such interpretation has been repeatedly confirmed, thereby inducing reliance by private parties. *Udall v. Tallman*, 380 U.S. 1, 4, 16-17 (1965); *Stinson v. United States*, __ U.S. __, 113 S.Ct. 1913, 1919 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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